

BRITISH COLUMBIA LABOUR RELATIONS BOARD

SIDHU & SONS NURSERY LTD.

(the "Employer")

-and-

UNITED FOOD AND COMMERCIAL WORKERS
INTERNATIONAL UNION, LOCAL 1518

(the "Union")

PANEL: Brent Mullin, Chair
Allison Matacheskie, Vice-Chair
Ken Saunders, Vice-Chair

APPEARANCES: Michael A. Watt, for the Employer
Chris Buchanan and Brett Matthews, for
the Union

CASE NO.: 58572

DATE OF DECISION: March 26, 2009

DECISION OF THE BOARD

I. **NATURE OF APPLICATION**

1 The Union applies under Section 141 of the *Labour Relations Code* (the “Code”) for leave and reconsideration of BCLRB No. B159/2008 (the “Original Decision”), which dismissed its application for certification on the basis that the bargaining unit applied for was inappropriate. The Union submits that this decision was inconsistent with Code principles and should be overturned on reconsideration. The Employer submits that the Original Decision is consistent with Code principles and should be upheld.

II. **ORIGINAL DECISION**

2 The Union applied for certification under Section 18 of the Code for a bargaining unit described as “all Seasonal Agricultural Workers Program (SAWP) employees” employed by the Employer. The Employer opposed the application on the basis that the unit was not appropriate for collective bargaining (para. 1).

3 It is common ground that the domestic farm workers and the SAWP employees performed the same job duties at all of the Employer’s locations (para. 2). Nonetheless, the Union alleged that the SAWP employees had a distinct community of interest from the domestic farm workers because of their different employment status and terms and conditions of employment (*ibid.*).

4 The Employer submitted that the proposed bargaining unit was inappropriate because it would cut across the farm worker classification by including foreign farm workers (SAWP employees) while excluding domestic farm workers (para. 6). It argued that a bargaining unit that cuts across classification lines is not viable for collective bargaining and does not conform to the principles of appropriateness set out in *Island Medical Laboratories Ltd.*, BCLRB No. B308/93 (Leave for Reconsideration of IRC No. C217/92 and BCLRB No. B49/93), 19 C.L.R.B.R. (2d) 161 (“*IML*”) (*ibid.*).

5 The Union submitted that its application did not cut across classification lines, because the SAWP employees’ temporary employment status and other distinctive terms and conditions of employment defined them as a separate classification (para. 7). The Union argued that one’s classification is not defined solely by one’s job duties or content. It also includes employment status and terms and conditions of employment (*ibid.*).

6 Alternatively, the Union submitted, if the SAWP employees cannot be characterized as a separate classification, the application should be allowed on the basis that the agricultural sector is traditionally difficult to organize and therefore appropriateness principles should be relaxed sufficiently to permit the bargaining unit to cut across classification lines (para. 8).

7 The Original Decision notes that, as of the date of certification, the Employer had 134 employees working in its wholesale nursery and blueberry farming business, excluding office and sales staff (para. 11). Of these, 73 were SAWP employees from Mexico and the Caribbean and the remaining 61 were domestic farm workers (*ibid.*). All

the farm workers – domestic and SAWP alike – were general labourers with no specific qualifications required to perform the work, which included potting, pruning, weeding, irrigation, cutting, spraying, fertilizing and grafting, as well as picking blueberries (para. 12). There was no specialization in performing these tasks, and all farm workers performed all of these duties at all of the Employer's locations on occasion: "The work performed by the domestic farm workers and the SAWP employees is the same" (*ibid.*).

8 SAWP is a federal government program to allow seasonal agricultural workers from Mexico and certain Caribbean countries to work in Canada on a temporary basis (para. 14). In order to recruit foreign farm workers through SAWP, the Employer had to obtain a labour market opinion from Human Resources and Social Development Canada confirming that it is unable to hire sufficient farm workers locally (*ibid.*).

9 When an employer hires foreign farm workers through SAWP, the terms and conditions of employment are set out in considerable detail in an agreement between the participating governments. Those terms and conditions of employment are in turn reflected in individual agreements signed by the employer and each of the SAWP employees hired (para. 15).

10 The Original Decision notes that the terms and conditions of employment set out in SAWP agreements cover "a broad range of matters, including, but not limited to:"

...the duration of employment (and in particular, the worker's obligation to return to his or her originating country at the end of the contract); the minimum applicable wage rate for harvesting and non-harvesting work; average minimum weekly hours of work; normal daily hours of work and the exceptions thereto; consecutive days of work per week and days of rest; trial period (i.e., probation) and the applicable standard to be applied if the Employer wishes to discharge the worker during the trial period; rest periods and meal breaks; provision of lodging and food, and the Employer's right to recover the cost of same; deductions from wages; insurance for occupational and non-occupational injury and disease and the payment of associated premiums; statements of earnings; air transportation to and from Canada; reception arrangements upon arrival in Canada; and other Employer and worker obligations.
(para. 16)

11 The Original Decision further notes that terms and conditions of employment for the Caribbean foreign workers are similar to those of Mexican foreign workers, "but also include some important differences, such as the requirement that 25% of the worker's wages be remitted to the Caribbean government agent" (para. 16).

12 The Original Decision found, based on the parties' submissions and an examination of the SAWP documents, that the SAWP employees' terms and conditions of employment differed from those of the domestic farm workers (para. 17). In particular, the SAWP employees are "temporary workers whose employment tenure is dictated not by the availability of work but by the requirements of the SAWP" (*ibid.*).

13 In 2008, for example, the Employer's complement of SAWP employees arrived in two groups, the first in January and the second in February, and were required to return home no later than September or October, depending on when they arrived, as the

"maximum duration of employment in one calendar year under the SAWP is eight months" (para. 18).

14 SAWP requires the foreign farm workers to live in accommodations provided by the Employer on the Employer's premises, and the Employer is required to provide food or access to cooking facilities (para. 19). The Employer is entitled to deduct from the employees' wages a prescribed amount to cover the cost of food and lodging (*ibid.*). The Original Decision notes that, while the Employer makes similar accommodation available to domestic farm workers as well, "the domestic farm workers are of course free to live elsewhere" (*ibid.*).

15 The Original Decision finds that the SAWP employees from Mexico speak Spanish and most do not speak English; while the SAWP employees from the Caribbean speak English (para. 20). The domestic farm workers are principally Canadians of South Asian descent and speak Punjabi (*ibid.*). The Original Decision accepts that "there are significant linguistic, social and cultural differences between the three groups (*ibid.*) It found that there may also be linguistic, social and cultural differences within each of the three groups; "however, neither party provided particulars of any such differences" (*ibid.*).

16 The Original Decision notes that the extent of communication between the three groups of workers was disputed, with the Union alleging a lack of meaningful communication as each group was separated by language and the Employer claiming that farm workers commonly communicate with one another non-verbally (para. 21). The Original Decision finds that the extent and nature of communication among the groups was not relevant to the issue of appropriateness because it did not find that this characteristic "significantly enhances or diminishes the degree of distinctiveness of the three groups of farm workers in relation to their workplace interests" (*ibid.*).

17 In analyzing whether the proposed unit was appropriate for bargaining, the Original Decision acknowledges that the Board is not limited to certifying the most appropriate bargaining unit, and that more than one potential bargaining unit may be appropriate (para. 25). Furthermore, where the application for certification arises in an industry that is traditionally difficult to organize, "the Board will relax its standards of appropriateness to enhance access to collective bargaining" (para. 26).

18 The Original Decision then states that, "[i]n order to ensure that I properly take into account relaxed appropriateness standards in the traditionally difficult to organize section of my analysis, I will first apply the *IML* factors in accordance with the standard approach to appropriateness (para. 27).

19 The Original Decision then applied each of the four *IML* factors to the facts (paras. 30-52).

20 With respect to the first factor, similarity of skills, interests, duties and working conditions, the original panel concludes in part:

With regard to the first *IML* factor, I find that the SAWP employees and the domestic farm workers have as much in common as they do to distinguish them. They share the same skills, duties and physical working conditions, have many terms and

conditions of employment in common, and have the same interests arising from these factors. On the other hand, they have differing interests arising from their distinctive employment status and unique terms and conditions of employment. Taking all of these considerations together, I find that the farm workers as a whole have a strong shared community of interest; within the broader group, I accept that the SAWP employees also have a distinct community of interest unto themselves rooted in their employment status and the aspects of their terms and conditions of employment that are unique to them (relating to matters of lodging, food, travel, immigration issues, name requests and the like). Overall, I find that the two groups have more in common than they do to distinguish them. (para. 33)

21 With respect to the second *IML* factor, the physical and administrative structure of the Employer, the Original Decision concludes in part:

In summary, while aspects of the Employer's physical and administrative structure provide some basis for distinguishing the SAWP employees, these distinctions simply mirror the distinctions found under the first *IML* factor. The distinctions are not great, and are largely outweighed by the similarities, which again are principally grounded in the fact that all farm workers perform all of the same work at all of the locations, without regard to their foreign versus domestic status. (para. 41)

22 With respect to the third *IML* factor, functional integration, the Original Decision notes that the Union argues that there is no functional integration while the Employer argues that its work sites are "fully integrated" (para. 43). The Original Decision finds that the parties' arguments on this point do not reflect a factual dispute but are "simply a matter of perspective" (para. 44). The Original Decision states in part:

I have concluded that functional integration is not a factor that precludes drawing a rational and defensible line around the SAWP employees. While it can be argued that perhaps the entire workforce works together as one team, that argument is addressed fully and more productively by considering whether it is appropriate to cut across a single classification. (para. 49)

23 With respect to the fourth *IML* factor, geography, the original panel finds that this factor does not support the appropriateness of the proposed unit because "no geographical distinctions can be drawn between the SAWP employees and the rest of the farm workforce" (para. 52).

24 Considering the four *IML* factors together, the Original Decision concludes that similarities between the domestic farm workers and the foreign farm workers (SAWP employees) outweigh the differences to the point that "I am persuaded that no rational and defensible line can be drawn around the SAWP employees based on their distinguishing characteristics" (para. 55).

25 This conclusion leads the Original Decision to consider the Union's argument that the Board's appropriateness (*IML*) criteria should be relaxed because agricultural workers are part of a traditionally difficult to organize sector. In that regard, the Original

Decision notes that the “Employer’s principal argument is that a bargaining unit that cuts across classification lines is not appropriate, even in a traditionally difficult to organize sector” (para. 59).

26 The original panel notes that, in response to this argument, the Union submits that its application does not cut across classification lines because SAWP employees are a distinct classification based on their different employment status and terms and conditions of employment (para. 61).

27 Alternatively, if the SAWP employees are not a distinct classification, the Union argued the Board should relax its appropriateness criteria because this is a traditionally difficult to organize sector, and a bargaining unit cutting across the farm worker classification should be permitted, if necessary, “to grant access to collective bargaining to a vulnerable group” (para. 62).

28 In addressing these arguments, the Original Decision concludes that, while the Board does not absolutely preclude the possibility of cutting across classification lines, it will only do so “rarely”, and only in the context of the “relaxed approach to appropriateness in a traditionally difficult to organize sector” (para. 64). The Original Decision finds that, in that context, the Board will “tolerate a greater degree of difficulty in labour relations to provide access to collective bargaining, but not to the extent that collective bargaining would not be viable” (para. 65).

29 With respect to whether the SAWP employees are a distinct classification, the original panel notes that the Union does not allege that any distinction can be drawn on the basis of the farm workers “skills, actual job duties or content, qualifications, or the type and nature of the work they perform” (para. 69). Instead, the Union argues that “the distinctive terms and conditions of employment under which the SAWP employees work, combined with their status as temporary workers, are aspects of their classification, and therefore justify the finding that there are two classifications – foreign farm workers and domestic farm workers” (*ibid.*).

30 The Original Decision rejected the Union’s argument, stating in part:

I am not persuaded that employment status and terms and conditions of employment are aspects of one’s job classification. Different job classifications must be distinguishable either by what work is performed or how the work is performed. That is not to say two classifications cannot overlap, however, their work must be distinguishable in some way. In this case, if the SAWP employees were treated as a separate classification, they would perform work that is completely indistinguishable from that of the domestic farm workers.

...

In this case, all of the farm workers – domestic and foreign alike – perform the same job duties (namely, potting, pruning, weeding, irrigation, cutting, spraying, fertilizing and grafting, and blueberry picking) at all of the various locations where the Employer operates. Groups of farm workers are not distinguishable from one another on the basis of job content, job

duties, or geography. The Employer has organized its affairs in a manner that creates one, singular classification of farm workers, and utilizes its entire farm worker complement in a uniform manner across all of its operations.

I have concluded that SAWP employees do not constitute a separate classification from the domestic farm workers. I find that the domestic farm workers and the SAWP employees together constitute a single farm worker classification. I am not persuaded that one's employment status nor one's terms and conditions of employment are aspects of one's classification. Hence, I do not accept the Union's argument that the SAWP employees are a distinct single classification. (paras. 70 & 73-74)

31 The Original Decision further concludes that, were it to accept that the foreign farm workers and the domestic farm workers were two separate classifications,

...I would then need to address the issue of functional integration because, in the absence of any systematic differences in actual job duties and content, skills and qualifications or type and nature of work performed between the two classifications, their work is shared in its entirety. The two classifications would overlap completely. This analytic outcome is not surprising – any attempt to cut across a single classification on the basis of anything other than job duties and content, skills and qualifications and the type and nature of the work performed will inevitably result in this type of functional integration problem. Classifications are only distinguishable in a meaningful way on the basis of their work related characteristics. (para. 75)

32 The Original Decision notes that the Board will cut through classification lines where employees in a single classification work at geographically separate locations, but that exception does not apply in the present case (paras. 77-79).

33 Turning to the Union's alternative argument, the original panel finds that it is "confronted with the same question that faced the panel in *Wal-Mart Canada Corp.*, BCLRB No. B301/2005 (Leave for Reconsideration of BCLRB No. B190/2005 and Certification dated September 7, 2005) ("*Wal-Mart #1*") — namely, under what circumstances (if at all) should the Board allow the division of a classification at a single work site in a traditionally difficult to organize sector?" (para. 80).

34 The Original Decision notes that in *Wal-Mart #1*, the Board stated that "...cutting across classification lines without a sufficient degree of distinctiveness between the employees will, necessarily, give rise to labour relations concerns because employees doing the same job, under the same terms and conditions of employment, will be inside and outside the proposed bargaining unit" (para. 80, quoting *Wal-Mart #1* at para. 52).

35 The Original Decision then states its view that "... in order for a unit that cuts across classification lines to be appropriate, the distinctiveness must be such that -- as in the case of geographical separation -- it allows for bargaining unit work to be distinguished from non-bargaining unit in some manner arising from the work itself and not from the persons performing it" (para. 81).

36 The Original Decision observes that, in *Wal-Mart Canada Corp. v. UFCW, Local 1518*, BCLRB No. B153/2006 (Leave for Reconsideration of BCLRB No. B5/2006) (“*Wal-Mart #2*”), the Board indicated that it does not require or seek evidence as to the type or degree of labour relations problems that could arise if a bargaining unit is certified that cut across classification lines (para. 83-84). The Original Decision further notes that, in *Sears Canada Inc.*, BCLRB No. B47/99 (“*Sears*”), the Board stated that, even in the context of a traditionally difficult to organize sector, “[t]here has to be a rational defensible line which could be drawn around the proposed unit so that collective bargaining could be deemed viable” (para. 85, citing *Sears* at para. 15).

37 The Original Decision concludes that collective bargaining would not be viable if the farm worker classification were subdivided into two groups (para. 86). In particular, the Original Decision finds that “[w]here the work performed by those in the bargaining unit is indistinguishable from the work performed by those excluded from the bargaining unit, there is no basis to define bargaining unit work and therefore, no basis to negotiate collective agreement provisions that depend on that definition for their efficacy” (para. 87).

38 The Original Decision also notes that in *Sears*, the Board refused to cut through a single classification even though the two groups were separated geographically to some degree – “inside employees and outside employees” (para. 89). In the present case, there would not be even this degree of distinction between the two groups of farm workers: “...if the application were to be granted, employees in the same classification doing the same work would be working side by side (within their respective informal groups perhaps) both within and outside the bargaining unit” (para. 90).

39 The Original Decision goes on to draw an analogy between the Board’s general reluctance to cut across classifications and its reluctance to “certify bargaining units that subdivide functionally integrated work” (para. 92). The Original Decision comments:

As I see it, there is no material difference between two different classifications sharing duties such that they are functionally integrated, and cutting across a single classification where the work performed by employees in and out of the proposed unit is indistinguishable. The same problems occur – there is no means of distinguishing between the work that is in the unit, and the work that is not. (para. 95)

40 The Original Decision further states, in part:

In the present case, I find that the labour relations problems are perhaps at their most acute. The Employer has one job classification that would be cut across to create the proposed unit. Farm workers make up virtually the entirety of the Employer’s workforce. ...Disputes regarding work jurisdiction and related issues would potentially affect every farm worker in the bargaining unit, and every work excluded from the unit, since all of the farm workers perform the same work across the entire operation. The labour relations problems that would arise are not isolated, but endemic; every farm worker is potentially affected.

....

... In the present case, I find that the labour relations problems would be so pervasive given the nature of the Employer's operation that even under relaxed appropriateness criteria, the proposed bargaining unit is not appropriate. In my view, viable collective bargaining cannot be achieved in this case. (paras. 96 & 98)

41 The Original Decision summarizes its conclusion on the issue of appropriateness as follows:

Applying the four *IML* factors, I find that the proposed bargaining unit is not appropriate for collective bargaining. I find that a rational and defensible line cannot be drawn around the unit as proposed, and that the application would cut across classification lines. I find that the Employer's farm workers – domestic and foreign alike – constitute a single classification; their work is indistinguishable.

Assuming without deciding that the agricultural sector is a traditionally difficult to organize sector and in turn applying relaxed appropriateness criteria, I nonetheless find that in all the circumstances, certification of a bargaining unit that cuts across the farm worker classification would, in this case and in these circumstances, result in significant problems relating to the viability of collective bargaining. The distinctiveness of the SAWP employees is not sufficient to overcome the labour relations difficulties that would result from doing so, and would preclude any meaningful definition of bargaining unit work, which would in turn undermine collective bargaining. (paras. 102-103)

III. SUBMISSIONS OF THE PARTIES

42 In seeking leave and reconsideration of the Original Decision, the Union submits that it is inconsistent with principles express or implied in the Code, "including the principle that the Board has a duty to facilitate access to collective bargaining". The Union further submits that the Original Decision "deprived a marginalized and traditionally difficult to organize group access to collective bargaining" by denying the Union's application for certification.

43 More particularly, the Union submits that, although it purported to assume that the sector was difficult to organize, the Original Decision did not in fact relax the Board's appropriateness criteria in applying them to the proposed bargaining unit:

The Original Panel considered that analysis pre-empted by its finding that the unit of SAWP workers were merely part of a broader classification of farm workers. It found that the Board would, only rarely allow a unit which cut across classification lines, and would not do so in situations such as these, where the job duties performed – though not the terms and conditions under which they were performed – were indistinguishable.

44 The Union submits that this failure to apply the Board's appropriateness criteria in a relaxed fashion was an error, relying on the following passage from *IML* at p. 185:

The same community-of-interest factors that we have outlined as applying in initial applications for certification are to be applied in determining an application for certification in traditionally difficult-to-organize situations. However, they are to be applied in a more "relaxed" fashion.

45 The Union alleges the Original Decision erroneously believed that it was not necessary to engage in that type of analysis in light of its findings that the SAWP unit would cut across classification lines and that it would be inappropriate to cut across classification lines in these circumstances.

46 The Union submits that it was necessary to engage in that type of analysis because either the Original Decision errs in finding that SAWP workers are not a separate classification or, alternatively, if the SAWP workers are part of a farm worker classification, then the circumstances are such that they should nonetheless lead the Board to relax the restriction articulated in *IML* against cutting across classification lines, and certify the unit.

47 In making these submissions, the Union relies on, and reiterates in summary form, the submissions it made to the original panel on these issues. The Union submits the Original Decision errs in rejecting (at para. 70) its submission that employment status and terms and conditions of employment can be relevant to the question of job classification for purposes of the appropriateness analysis. The Union submits that although job content or description is obviously relevant to job classification, the Original Decision errs in precluding consideration of other factors such as status and terms and conditions of employment.

48 The Union submits that, when these other factors are considered in the present case, it is clear that SAWP workers constitute a separate classification for purposes of appropriateness analysis. The Union notes that the Original Decision accepts (at para. 17 and elsewhere) that the employment status and terms and conditions of employment of SAWP employees were significantly different from those of the domestic farm workers.

49 The Union submits that, in these circumstances, SAWP workers must be considered a separate classification. While the Board in *IML* indicated a reluctance to certify a single classification, the Union submits that the Board also indicated that this reluctance would be overcome where the single classification constituted the majority of employees in the workplace. Here, the Union submits, SAWP workers did constitute the majority of the Employer's employees.

50 The Union further submits that the traditionally difficult to organize doctrine applies to farm workers and that accordingly the Board should be prepared to find the unit applied for appropriate based on a relaxed application of the *IML* appropriateness factors. In particular, even if the Board does not accept that the SAWP employees constitute a separate classification, the Board should be prepared to cut across classification lines in the circumstances of this case.

51 With respect to the concerns expressed in the Original Decision regarding the viability of collective bargaining in circumstances where employees in the farm worker classification are both inside and outside the bargaining unit, the Union submits that the

Board has found bargaining to be viable in such circumstances. For example, the Union submits, the Board “routinely” certifies a single location of an employer even where that cuts across classification lines.

52 The Union submits that the test for cutting across classification lines should remain as articulated in *Wal-Mart #1*, that is, that there must “quite distinct communities of interest (even within the same classification)”. The Union submits the Original Decision errs in adding a further requirement that it must be possible to distinguish bargaining unit work from non-bargaining unit work.

53 The Union submits that, ultimately, the Board’s determination of appropriateness should be based on a consideration of whether the group of SAWP workers share a community of interest distinct from that shared by the domestic farm workers. The Union submits that unquestionably they do, and that therefore, whether they are considered a separate classification or a distinct group within the farm worker classification, a rational and defensible line can be drawn around them for purposes of determining bargaining unit appropriateness.

54 The Union seeks an order overturning the Original Decision and finding that the unit applied for is appropriate for collective bargaining.

55 In response, the Employer submits that the Original Decision does not err in finding that the proposed unit does not meet the Board’s criteria for appropriateness, either on a traditional analysis or a “relaxed” application of the *IML* factors under the traditionally difficult to organize doctrine. The Employer submits there is no basis for interfering with the Original Decision’s analysis and determination of the issue of appropriateness.

56 In particular, the Employer submits that the Original Decision did not fail to apply a relaxed analysis of the appropriateness criteria under the traditionally difficult to organize doctrine, as alleged by the Union. The Employer submits that the Original Decision finds that, even assuming the sector is traditionally difficult to organize, and appropriateness criteria are therefore to be relaxed, the unit applied for remains inappropriate because it is not viable for collective bargaining.

57 The Employer also submits that the Original Decision did not err by concluding that SAWP employees are not a separate classification, and that this is not one of those rare cases where it is appropriate to cut across classification lines. The Employer notes that, in *Wal-Mart #2*, the Board stated (in overturning an original decision which allowed an application for certification that cut across classification lines):

As acknowledged in the Second Original Decision, the Board has *never* certified a unit which cut across a classification of employees at a single integrated site. (para. 25, emphasis added)

58 The Employer submits that the Board stated (in *Wal-Mart #2* at para. 26) that reconsideration is not a forum for re-analyzing the application of appropriateness criteria, and the Board will only interfere where the inferences and conclusions drawn are not within a range of possibilities under the law and policy of the Board. The Employer submits the original panel properly assessed the appropriateness criteria in

finding that no rational and defensible line could be drawn around the SAWP employees based on their distinguishing characteristics.

59 The Employer further submits that the manner in which the Employer has organized its operations – most significantly, the way agricultural work is performed on a day-to-day basis, with all farm workers, foreign and domestic, performing the same duties at the same locations – is the basis for finding that SAWP employees are not an appropriate unit for collective bargaining.

60 The Employer submits that the Board's decisions have clearly established that a bargaining unit where employees performing the same duties, at the same locations, resulting in half the employees in the unit and the other half out, is not appropriate: *IML* at p. 36, *Wal-Mart #2* at paras. 26-30, *Vancouver Film School*, BCLRB No. B291/2003 (Leave for Reconsideration of BCLRB No. B387/2002) at para. 29.

61 The Employer submits that the principle is well established that the Union must take the Employer as it finds it; there is no obligation on the Employer to reorganize to facilitate viable collective bargaining. The Employer submits the Original Decision correctly identifies the labour relations problems that would arise where employees in and out of the unit perform the same work, and was correct in concluding that the proposed bargaining unit would not ensure the viability of collective bargaining.

62 The Union filed a final reply. The Employer objected to much of the Union's final reply on the basis that it did not constitute reply, but rather new facts and arguments. The Employer provided a sur-reply in the event the Board considered the final reply. The Union did not object to the Employer's filing a sur-reply as long as it was provided a further opportunity to make a final reply. In our view, the parties' positions and their submissions on the essential issues in this application for reconsideration are largely captured in the Union's application submission and the Employer's response to it. We agree with the Employer that much of the Union's final reply is not in the nature of reply but rather contains new argument which could have been made in its application.

63 In these circumstances, and in furtherance of our Section 2(e) duty to facilitate the constructive resolution of disputes, we find it is appropriate to consider the Employer's sur-reply regarding new points raised in the Union's reply. In our view, this result gives both parties a fair opportunity to elaborate their respective positions as to the merits of the application for reconsideration.

IV. ANALYSIS AND DECISION

64 An application under Section 141 must meet the Board's established test before leave for reconsideration will be granted. An applicant must demonstrate "a good arguable case of sufficient merit that it may succeed on one of the established grounds for reconsideration": *Brinco Coal Mining Corporation*, BCLRB No. B74/93 (Leave for Reconsideration of BCLRB No. B6/93), 20 CLRBR (2d) 44 ("*Brinco*"). A *prima facie* case will not suffice; an applicant must raise a serious question as to the correctness of the Original Decision.

65 We have considered all of the arguments of the parties in what follows.

66 In arguing that the proposed unit is appropriate, both before the original panel and on reconsideration, the Union submits that either SAWP workers constitute a distinct and separate classification from domestic farm workers (and therefore their application does not cut across classification lines) or, alternatively, that if SAWP workers are part of a single farm worker classification, then they have such a distinct community of interest that a rational and defensible line can be drawn around them, if necessary on the basis of a relaxation of the Board's standard criteria for appropriateness under the traditionally difficult to organize test.

67 The Union submits the Original Decision erred, and rendered a decision inconsistent with Code principles, in rejecting these arguments for finding the proposed unit of SAWP workers appropriate for bargaining.

68 The argument regarding whether SAWP workers constitute a separate and distinct classification turns largely on whether the different employment status and terms and conditions of employment as compared to domestic farm workers are a relevant consideration. It is not disputed that foreign and domestic farm workers perform the same work at the same locations for the Employer. Rather, the point of distinction is the different employment status and terms and conditions of employment under the SAWP program for foreign farm workers as compared to the domestic workers.

69 In our view, there is a serious question as to the correctness of the original panel's determination that the different employment status and terms and conditions of employment of the SAWP workers as compared to the domestic farm workers are essentially irrelevant in respect to the *IML* issues under consideration. As a result, leave is granted.

70 The Original Decision finds that the terms and conditions under which the SAWP employees are employed are markedly different from those of the domestic employees. It concludes that there is a "distinct community of interest" of the SAWP employees "rooted in their employment status and the aspects of their terms and conditions of employment that are unique to them (relating to matters of lodging, food, travel, immigration issues, name requests and the like)": para 33.

71 We do not agree as a matter of law and policy under the Code that a classification of employees is "only distinguishable in a meaningful way on the basis of their work related characteristics": para. 75. The circumstances of the present case provide probably as vivid an example of why that is not true in every case. The distinctions between the SAWP and domestic workers are marked and real. Simply because they arise from differing terms and conditions of employment and employment status, rather than job duties, does not make them any less meaningful from a collective bargaining standpoint. These distinctions lead to concerns and interests particular to the SAWP employees. This is a real consideration that needs to be acknowledged when determining the appropriateness of the proposed unit.

72 When considering the community of interest factors under *IML*, the Original Decision finds that the SAWP employees have identifiable differences arising from their employment status, unique terms and conditions of employment, cultural, linguistic and social differences. However, it finds these differences are essentially irrelevant to determining what can be considered a classification of employees: paras. 70 and 74-

75. At different points in the Original Decision, the panel also finds "these differences are dramatically outweighed by the common skills, duties and physical working conditions": para. 53; see also paras. 33 and 99, original panel. The Original Decision concludes, largely on the basis of the work performed, that the proposed unit is not appropriate.

73 We find that the approach in the Original Decision is not correct, as the different employment status and terms and conditions of employment of the SAWP workers are relevant to the *IML* determinations to be made. They fall within the "interests" criterion in the first of the four, initial *IML* factors: *IML*, pp. 179-181. Accordingly, it was incorrect for the Original Decision either to not take them into account or discount them when considering the *IML* community of interest factors. In our view, the approach taken in the Original Decision is in error in focusing virtually solely on the bargaining unit work performed and does not allow for a proper evaluation of the unique, if not unprecedented, nature of the circumstances of the SAWP employees.

74 The unique features of the SAWP workers' circumstances must be taken into account both when determining whether they are a separate classification of employees; or if they are found to be part of a single classification, when determining if it is justified to make an exception to the *IML* "restriction" against certifying units that cut across a classification.

75 In respect to the latter, it should be noted this *IML* restriction is not an absolute rule: *Wal-Mart #1*, para. 41. Further, the Board held in that decision that considerations relating to "job content" and the "type and nature of the work performed" are "usually", not always, used to determine the boundaries of a classification.

76 It also needs to be recognized, however, that the fact that it is impossible to distinguish bargaining unit work from non-bargaining unit work is ordinarily determinative of there not being a distinct community of interest that would justify drawing a line around a unit of employees within a classification. Concerns about the potential for disputes about work jurisdiction are integral to the Board's consideration of functional integration as a community of interest criterion, as well as the policy against certifying units that cut across classification lines.

77 However, those are only two of a number of community of interest criteria to be considered under *IML*. Included in that framework is the first community of interest factor — whether employees in the proposed unit share a similarity in skills, interests, duties and working conditions. One way of looking at the unique circumstances in the present matter may be whether the "interests" of the SAWP employees are sufficiently unique to overcome the rationale and weight of the other *IML* factors and "restrictions".

78 It is in respect of that first *IML* criterion that SAWP workers present an unusual case. What makes the case unusual is that the distinctiveness of the SAWP workers lies not in the work they do, which is the same as the domestic farm workers, but rather in their interests as a result of their unique employment status and terms and conditions of employment.

79 As noted in the Original Decision, the SAWP workers' terms and conditions of employment and employment status are governed by the SAWP agreements, which

govern a host of fundamental and significant terms and conditions of employment set out in paragraph 16 of the Original Decision (reproduced above in paragraph 10). Another feature that sharply distinguishes the SAWP employees lies in the fact that they do not enjoy the same right of job mobility as do the domestic workers. These considerations put the SAWP workers in a unique position in their relationship with the Employer and give rise to separate collective bargaining interests. All of this must be properly considered in respect to the standard *IML* criteria or the traditionally difficult to organize approach, if applicable.

80 We add that our decision and comments here do not lessen the force of the Board's policy against cutting across classification lines, which will continue to be strictly applied. Exceptions to that policy will be rare and unusual. As set out above, the issue in the present matter is whether the circumstances of the SAWP employees are so unique as to overcome these other *IML* factors and restrictions.

81 We also find that the Original Decision's view of collective bargaining and what constitutes a collective agreement does not cover the full terrain of what collective bargaining and collective agreements under the Code can be and perhaps even should be. Collective bargaining can, and in many cases has followed a strict work jurisdiction model (relied on in paragraphs 87 and 97 of the Original Decision leading to the conclusion in paragraph 99 of the Original Decision). But it need not do so. In that regard, we note that in their 1992 report *Recommendations for Labour Law Reform*, the Sub-committee of Special Advisors stated that "...management and labour must engage in a more fluid and adaptable relationship than that envisaged by the traditional bargaining model, to achieve workplace change and improvements on an ongoing basis that will be to the mutual benefit of the employer and the employees and the Province" (p. 15). Certainly the Code, and in particular the current Code as amended in 1993 and 2002, does not require that collective bargaining, and the collective agreements flowing from it, take on that traditional form. It is well established that certification under the Code results in the certification of a group of employees, not a body of work. Collective bargaining can be as described in the Original Decision, but that is not a result compelled by certification and in some cases may not be the favoured result under the current Code.

82 If a "more fluid and adaptable relationship" is being sought based on the asserted unique interests of the SAWP employees, as opposed to a work jurisdiction driven collective bargaining approach, that may be a relevant consideration in terms of determining what would, or would not, constitute an appropriate bargaining unit in the circumstances of this case.

83 Turning to remedy, we note that the errors in the Original Decision are in the nature of law and policy under the Code, not determinations of credibility or similar such matters. As well, in general the structure and processes under the Code indicate a preference for an initial determination in a matter to be made at first instance: *Wal-Mart #1*, para. 28. The value of that can be seen in the present matter, for instance, in terms of the benefit of having access to the reconsideration process. As a result, the Original Decision is overturned, but the matter is remitted to the original panel to be re-determined in light of our decision here. We add that the panel and the parties can follow whatever process is found to be appropriate in the circumstance.

V. CONCLUSION

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In the result, leave is granted, the Original Decision is set aside and the matter is remitted to the original panel for a fresh determination regarding the appropriateness of the proposed unit.

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